SIGMA M EXPLORATIONS INC.

IBLA 94-139 Decided August 13, 1998

Appeal from a decision by the California State Office, Bureau of Land Management, declaring 41 mining claims abandoned and void for failure to pay annual rental fees for the 1993 and 1994 assessment years. CAMC 245456 through 245470, CAMC 245473, CAMC 245474, CAMC 245477, CAMC 245478, CAMC 245481, CAMC 245482, CAMC 245484 through 245491, CAMC 245493, CAMC 245494, CAMC 248591, CAMC 248592, CAMC 248599 through 248605, CAMC 248607.

Decision affirmed in part, as modified, and reversed in part.

1. Administrative Procedure: Adjudication--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption--Notice: Constructive Notice

   A decision which neither informs individual applicants for small miner exemptions that they did not qualify nor explains why the failure of a corporate applicant to qualify for an exemption also precludes them from receiving exemptions did not adjudicate their individual applications and cannot be construed as finding that their ownership interests in the mining claims were abandoned and void. Return of undelivered copies of the decision to BLM does not present an issue whether constructive service was achieved by attempted delivery to the last address of record.

2. Administrative Procedure: Stays--Mining Claims: Litigation--Mining Claims: Rental or Claim Maintenance Fees: Generally--Rules of Practice: Appeals: Stay

   The Department of the Interior and Related Agencies Appropriations Act for Fiscal 1993 imposed rental fees for unpatented mining claims on Federally owned lands in lieu of meeting assessment work requirements and the filing requirements of 43 U.S.C. § 1744(a) (1994). When a BLM decision that a mining claim was null and void ab initio has become effective as provided by 43 C.F.R. § 4.21, no claim is extant, there is no obligation to perform assessment work and file the documents required by 43 U.S.C. § 1744(a) (1994), and no requirement to pay claim rental fees.

3. Mining Claims: Rental or Claim Maintenance Fees: Generally--Small Miner Exemption: Qualification: Co-ownership of Mining Claims

   When BLM determines that, due to a provision in sales documents for mining claims, the transferor retained an ownership interest in the claims, those claims will be attributed to the transferor for purposes of the small miner exemption.

4. Attorney Fees: Equal Access to Justice Act: Adversary Adjudication--Equal Access to Justice Act: Adversary Adjudication

   Under Departmental regulations, attorney fees may not be awarded under the Equal Access to Justice Act when there has not been an "adversary adjudication" as that term is defined in regard to the Act.

APPEARANCE: D.W. Phifer, CEO, Sigma M Exporations, Inc., Temecula, California.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Sigma M Exporations, Inc. (Sigma) has appealed an October 27, 1993, Decision by the California State Office, Bureau of Land Management (BLM), declaring 41 lode mining claims abandoned and void for failure to pay annual rental fees of $100 per year for the 1993 and 1994 assessment years by August 31, 1993, as required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal 1993, Pub. L. No. 102-381, 106 Stat. 1374 (1992). The Decision notes that 6 applications for small miner exemptions from the rental fees were filed on August 31, 1993, as allowed by the Act for claimants who have 10 or fewer claims. See id. at 1378-79. 1/ BLM pointed out that sale documents which had been filed with the applications stated: "Claims may not be sold or encumbered without the express permission of the Corporation." BLM informed Sigma and the other recipients of the Decision that: "This statement is interpreted to mean that Sigma M Exploration, Inc. did not convey full interest in the subject mining claims." Consequently, BLM concluded that Sigma "retained an interest in (44) forty-four mining claims and mill sites (all being listed on the (6) six applications) and; therefore, has exceeded the 10-claim limit required for an exemption from the $100.00 per claim rental fee requirement." Because Sigma had not paid rental fees, BLM declared the mining claims abandoned and void.

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1/ The case file contains 12 applications from 6 applicants, each having filed separate applications for the 1992-93 and the 1993-94 assessment years.

On appeal, Sigma asserts that BLM "does not understand the law, facts or documents submitted" to it and that the Decision is arbitrary, capricious, and invalid. (Statement of Reasons (SOR) at 1, 5.) Sigma claims that, among other matters, BLM has misstated the number of mining claims and their ownership, incorrectly identified the number of owners, misspelled the names of two owners, and sent the Decision to the wrong address for one owner. Id. at 5. To correct matters, Sigma provides a list of the claims, claim numbers, and owners. Next, Sigma objects to BLM including the April No. 1R (CAMC 245456) in the Decision while a previous decision declaring it null and void ab initio was on appeal before the Board. Id. at 2. As described by Sigma, the issue in that appeal is whether the claim is within the San Mateo Wilderness Area and its resolution depends upon resolving conflicting descriptions of the boundary made by BLM and the U.S. Forest Service. Id. Sigma argues that BLM exceeded its authority by voiding the claim while the appeal was pending.

Sigma explains that in August 1993, it sold 36 of its 43 lode mining claims to five parties, retaining ownership of seven. Id. "Concurrent with the sale," Sigma states, "the new owners contracted with SME for SME to act as their agent for mining operations," and "the sale was contingent on the buyers[']agreement to obtain SME's permission prior to selling or encumbering their claims." Id. at 2-3. Sigma believes that BLM's Decision declared that it "did not sell the claims" and argues that it sold the "full right and title to 36 claims to 5 persons * * * exclusive of [the] right to sell or encumber without SME permission." Id. at 3. Furthermore, Sigma argues, "[t]he U.S. relinquished title to the mineral resources when SME located the claims" and, having retained no title to the minerals, "cannot intervene in or affect a sale between separate parties" or void a sale to which it is not a party. Id. at 4. Such action, Sigma believes, is the equivalent of taking private property and is prohibited by the Constitution. Id. at 5-6. Sigma also argues that conditional sales are a common business arrangement and asserts that it "retained no control over the owners or the private property." Id. at 5. Finally, Sigma requests attorney fees for the time spent preparing its appeal. Id. at 6.

After receiving the appeal, BLM responded by letter to Sigma dated December 1, 1993. BLM accepted Sigma's corrections as to the ownership the documents showed for some claims and apologized for misspelling some owners' names, explaining that "the applications were handwritten and the writing was difficult to interpret." BLM, however, continued to disagree with Sigma about the number of claims included in the exemption applications and provided an additional list of the claims covered by them. Otherwise, BLM did not respond to the arguments raised by Sigma.

Prior to addressing other issues, it is necessary to resolve the parties' dispute about the number of claims affected by the Decision, and thereby at issue before the Board, as well as to correct several factual matters pertaining to them.

The Decision on appeal lists the lode claims identified in each of the six exemption applications and the name of the applicant. As noted by BLM, it is difficult to discern some letters in the handwritten applications, although names in the sale documents are clearer. Sigma's corrections are accepted and the Decision is modified to change "F. Sigola" to "F. Sigala" and "C & G Refining" to "C & G. Reinking." In addition, as agreed by BLM in its response, the Decision is modified to state that application number 4, listing seven lode claims and three mill sites, was filed by Sigma. In accord with these changes, the Decision is modified by striking footnote 2 which states: "All applications were signed by D. Phifer for Sigma M Explorations, Inc., Agent." Application number 4 was signed by D. Phifer as CEO of Sigma and application number 6 was signed by D. Phifer for himself.

The disagreement about the number of claims at issue arises because the parties are counting different matters. Sigma lists the mining claims which are part of its operation, including 43 lode claims and 3 mill sites for a total of 46. BLM counted the number of mining claims listed in the exemption applications and determined that there were 41 lode claims and 3 mill sites for a total of 44. As noted by BLM, rental fees were paid for the three mill sites. As also noted by BLM, the difference in the number of lode claims occurs because neither the Brown Dog No. 15R (CAMC 245471) nor the Brown Dog No. 16R (CAMC 245472) were included in any of the exemption applications. 2/ Thus, BLM correctly determined that small miner exemption applications had been filed for 41 lode claims. 3/

2/ By letter dated Dec. 13, 1993, Sigma replied to BLM's Dec. 1, 1993, response to the appeal. Among other matters, Sigma states that "[t]hrough administrative error, Brown Dog 15R and 16R were not included in the Small Miner's exemption request for Mr. Sigala. Mr. Sigala desires they be included and hereby so requests."

3/ As shown by the applications, the claims at issue on appeal are:

1. K. Phifer: Brown Dog Nos. 2R through 7R (CAMC 245458 through 245463).
2. C & G. Reinking: Brown Dog No. 8R (CAMC 245464), Brown Dog Nos. 17R through 20R (CAMC 248602 through 248605), Brown Dog Nos. 21R and 22R (CAMC 245473 and CAMC 245474), Brown Dog Nos. 23R through 25R (CAMC 248599 through 248601).
3. F. Sigala: Brown Dog Nos. 11R through 14R (CAMC 245467 through 245470).
4. Sigma M Exporations, Inc.: Brown Dog R (CAMC 245457), Brown Dog Nos. 9R and 10R (CAMC 245465 and 245466), Roblar Nos. 8R and 9R (CAMC 245490 and 245491), and Roblar Nos. 10R and 11R (CAMC 245493 and 245494).
5. William Plummer: Har Har Nos. 1R and 2R (CAMC 248591 and 248592), Har Har Nos. 3R and 4R (CAMC 245477 and 245478), Har Har No. 5R (CAMC 248607).
6. K. Phifer: Roblar Nos. 2R through 7R (CAMC 245484 through 245489), April No. 1R (CAMC 245456), Oak Nos. 1R and 2R (CAMC 245481 and 245482).

Sigma also asserts that BLM's Decision lists the wrong address for K. Phifer. The case file includes two copies of the Decision which were returned to BLM as undelivered. One mailed to K. Phifer bears post office markings showing that it was returned unclaimed after two notices had been issued. In addition, handwritten notes indicate that the street name may not have been correct. The copy of the Decision sent to "F. Sigola" was returned to BLM marked "no such number." The sales documents filed by Sigma do not provide the purchasers' addresses and it appears BLM sent the Decision to the addresses appearing on the exemption certificates. As with the names of the claims owners, not all of the handwritten letters are clear. Subsequently, Sigma has filed proofs of labor for the claims. The street addresses for both F. Sigala and K. Phifer are unclear, although the street number for F. Sigala is 743 rather than 187 as reported on the exemption certificate.

[1] BLM is required to send a decision to the last address of record a party has given the appropriate BLM office. 43 C.F.R. § 1810.2(a). If a decision is delivered to the last address of record, the party is deemed to have received it "regardless of whether it was in fact received by him." 43 C.F.R. § 1810.2(b). The issue raised by the lack of clear addresses for F. Sigala and K. Phifer is whether they received constructive service of the Decision by the attempted delivery at the addresses used by BLM. If they were served, the Decision became binding upon them. On the other hand, if constructive service was not achieved, the Decision would not affect their interests in the claims. See Lanny Perry, 131 IBLA 1, 5-6 (1994). Examination of the Decision itself, however, reveals that the issue need not be resolved. Although BLM addressed its Decision to both Sigma and the individual applicants, the Decision itself, finds only that Sigma did not qualify for an exemption because it had retained an interest in 44 mining claims. It neither informs the individual applicants that they did not qualify for exemptions nor explains why Sigma's failure to qualify precludes them from receiving exemptions. Because the Decision did not adjudicate their exemption applications, it cannot be construed as finding that their ownership interests in the mining claims were abandoned and void. 4/ Id. Consequently, there is no need to determine whether F. Sigala and K. Phifer were properly served with the Decision.

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4/ If the Decision was found to affect the individual applicants, an additional issue would be presented whether Sigma could represent them on appeal. Practice before the Board is controlled by 43 C.F.R. § 1.3. See 43 C.F.R. §§ 4.3(a), 1812.1-1. An individual who is not at attorney may practice in regard to a matter in which he represents himself, a member of his family, a partnership of which he is a member, or a corporation, business trust, or association of which he is an officer or full-time employee. 43 C.F.R. § 1.3(b)(3). The regulation does not authorize practice by an "agent" or an individual performing a service for a client other than as an attorney. Helmut Rohrl, 132 IBLA 279, 281 (1995); Leonard J. Olheiser, 106 IBLA 214, 215-6 (1988); Robert G. Young, 87 IBLA 249, 250

Next, Sigma argues that BLM lacked authority to include the April No. 1R lode claim because Sigma's appeal of a previous decision declaring it null and void ab initio had not been ruled upon by the Board. That Decision, dated April 13, 1993, declared the claim null and void ab initio because it was located on withdrawn land within the San Mateo Canyon Wilderness. Sigma filed a timely notice of the appeal which was docketed as IBLA 93-397. Sigma is correct that its appeal had not been ruled upon when BLM issued its October 27, 1993, Decision.

Shortly before BLM issued the Decision on appeal, the regulation governing the effectiveness of decisions, 43 C.F.R. § 4.21, was revised to provide that a decision is automatically stayed only during the period a party may file a notice of appeal. See 58 Fed. Reg. 4939, 4942-43 (Jan. 19, 1993). To preclude a decision from becoming effective, a party must request that the Board issue a stay, in which case the automatic stay is extended an additional 45 days. 43 C.F.R. §§ 4.21(a)(3), 4.21(b)(4). Unless the Board grants a stay, the decision becomes effective upon expiration of the 45-day period. See David L. Burton, 11 OHA 117 (1995). Sigma did not request a stay and, as provided by the regulation, the Decision became effective the 31st day after it was received by Sigma on April 19, 1993. 43 C.F.R. §§ 4.21(a)(2), 4.411(a).

Prior to revision of the regulation, the Board addressed the status of mining claims pending review of a Departmental Decision in Andrew L. Freese, 50 IBLA 26, 87 I.D. 395 (1980). The mining claims at issue in that case were within the Sawtooth National Recreation Area and had been declared null and void following a Government contest. While the contest Decision was under appeal before the Board, BLM had granted a deferment of assessment work, but it denied a deferment after the Board affirmed the Decision and judicial proceedings were no longer pending. Id. at 28-29, 87 I.D. at 395-96; see United States v. Freese, 37 IBLA 7 (1978). The Board rejected Freese's argument that he qualified for a deferment because the claims were "in litigation" due to the fact he intended to appeal to the United States Supreme Court. The Board stated:

> In effect, the question is whether it is possible to grant a petition for deferment of assessment work when the claim for which the petition is sought has been determined finally,

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fn. 4 (continued)
(1985). An appeal brought by a person who does not fall within one of the categories of persons authorized to practice before the Department is subject to dismissal. Resource Associates of Alaska, 114 IBLA 216, 218 (1990); Leonard J. Olheiser, supra, at 215. The question whether Sigma may represent the individuals, other than D. Phifer who may represent himself as well as Sigma, presents the same question as raised by BLM's Decision. If BLM is correct and Sigma is a co-owner of the claims, the company may represent the individual applicants, but if they are the sole owners of the claims, it may not.

> within the Department, to be invalid where there has been no contrary judicial finding. We hold that such a petition may not be granted; allowance of such a petition would constitute an action directly contrary to, and inconsistent with, the finding of invalidity.
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> While it is possible that a Federal court may subsequently determine that the Department's decision invalidating a claim was erroneous, until such a decision is rendered there is no cognizable claim against the Government. In the absence of a timely appeal, the decision of the Department is final and of immediate effect. The effect of a court reversal is to reinstate a claim, on a nunc pro tunc basis. But until such action occurs, there is no claim extant. Thus, there is no assessment work obligation, and no possibility for obtaining a deferment of assessment work.
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> To hold otherwise would require that the Government grant a deferment of assessment work for a claim whose existence the Government denies. Moreover, inasmuch as the statute provides for only 2 years of deferment, * * * the Government might well be required, even in the case of withdrawn land, to permit the performance of assessment work, and the concomitant surface disturbance, in situations in which the Department has declared the claim a nullity. At least as regards withdrawn land, such a result would seem contrary to elementary logic.

Andrew L. Freese, supra, at 34-36, 87 I.D. at 399.

Freese was followed in J.L. Block, 98 IBLA 209 (1987). The Board had affirmed a BLM decision finding a mining claim to be abandoned and void for failure to file pertinent documents by October 22, 1979, as required by section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1994), and the claimant had appealed the Decision in Federal district court. Id. at 210-11; see Nevada Pacific Co., 46 IBLA 208 (1980). After the court reversed the Board's Decision, Nevada Pacific Co. v. Andrus, Civ-LV-80-431 (June 30, 1983), BLM issued a Decision finding the claim to have been abandoned and void for failure to annually file an affidavit of assessment work or a notice of intention to hold as required by subsection 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1994), during the years the Board's Decision was under review by the court. The Board held that, when it had "affirmed BLM's decision declaring the claim at issue abandoned and void, the claim ceased to exist" and "filing a suit for judicial review did not alter this fact." J.L. Block, supra, at 211-12. "There being no claim recognized by the Department during the period" the appeal was pending in Federal court, "BLM could not require appellant to satisfy the filing requirements of section 314 * * *." Id. at 212.

At the time BLM issued the initial decisions which gave rise to the issues addressed in Freese and Block, 43 C.F.R. § 4.21 provided that a decision was automatically stayed pending review of an appeal by the

Board. Consequently, when the Board affirmed those Decisions, they became effective and the claims "ceased to exist." As noted above, the revision of section 4.21 limited the automatic stay and a decision becomes effective upon expiration of the period for filing a notice of appeal or 45 days thereafter if a stay petition is filed. 43 C.F.R. §§ 4.21(a)(3), 4.21(b)(4). Because Sigma did not request a stay of BLM's Decision finding the April No. 1R null and void ab initio, it became effective and the claim "ceased to exist," the Department's records showing it to have been a nullity from the date of its location. By the Decision now on appeal, BLM declares the claim to have been abandoned and void because Sigma was not granted a small miner exemption and neither Sigma nor D. Phifer, the reported claim owner, paid rental fees by August 31, 1993.

[2] The Department of the Interior and Related Agencies Appropriations Act for Fiscal 1993, supra, imposed rental fees "for each unpatented mining claim, mill or tunnel site on federally owned lands" and "in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. [§§] 28-28e), and the filing requirements contained in section 314 (a) and (c) of the Federal Land Policy and Management Act of 1976 * * *." Id. at 1378 (emphasis supplied). Because rental fees are required in lieu of compliance with the statutory requirements, the underlying question is, as in Freese and Block, whether Sigma was required to perform assessment work on the April No. 1R. Clearly it was not. BLM's Decision became effective as provided by 43 C.F.R. § 4.21 and the April No. 1R "ceased to exist" as a cognizable claim against the Government. J.L. Block, supra, at 211. Because it was not extant as a mining claim on Federally owned land, there was no obligation to perform assessment work and no requirement to file an affidavit of assessment work or a notice of intention to hold with BLM. Id. at 212; Andrew L. Freese, supra, at 35, 87 I.D. at 399. Correspondingly, it was not possible to pay rental fees in lieu of meeting statutory requirements which did not apply. If Sigma had applied for a deferment of assessment work or had filed a plan of operations to undertake assessment work, see 43 C.F.R. § 3809.1-4(b)(4); Ronald E. Milar, 133 IBLA 214 (1995), approval would have been directly contrary to, and inconsistent with, the finding that the claim is null and void. Indeed, even reviewing such applications would require BLM to act in a manner contrary to the fact that it does not recognize the claim to exist.

The fact that BLM's Decision remained subject to review by the Board did not affect the status of the claim. Unless and until the Decision is reversed, set aside, or otherwise modified by the Board or a court it is effective and final for the Department and BLM may act based upon its effectiveness. See David L. Burton, supra, at 128-29. As recognized by 43 C.F.R. § 4.21(c), the consequence of making a decision effective pending review of an appeal is that a court also has jurisdiction to undertake review. See 5 U.S.C. § 704 (1994); United States v. Consolidated Mining & Smelting Co., 455 F.2d 432, 439-40 (9th Cir. 1970); Blake v. Babbitt, 837 F. Supp. 458, 460-61 (D.D.C. 1993); see also Arch Minerals Corp. v. Babbitt, 894 F. Supp. 974, 979-81, 985 (1995), aff'd, CA-95-32-2 (4th Cir.

Jan. 16, 1997). 5/ "Agencies may avoid the finality of an initial decision, first, by adopting a rule than an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be `inoperative' pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review." Darby v. Cisneros, 113 S.Ct 2539, 2547 (1993). 6/ It would be inconsistent for the Government to argue before a court that a mining claim is null and void while insisting that the claimant must satisfy the laws applicable to valid claims.

As in other circumstances in which the Board has held that a decision which has become effective may be relied upon pending review of an appeal, both Sigma and BLM should be able to, and be expected to, act in accord with the legal effect 43 C.F.R. § 4.21 gives a decision. See Kay Papulak, 132 IBLA 117, 119-20 (1995) (oil and gas lease properly issued after rejection of prior lease offer was effective); Bennie Sinerius, 115 IBLA 312, 315-16 (1990); Ark Land Co., 97 IBLA 241, 248 (1987) (likelihood of judicial review does not bar collection of increased coal royalty); Holland Livestock Ranch, 52 IBLA 326, 357-58, 88 I.D. 275, 292 (1981), appeal dismissed, Civ. No. C-87-254-K (D. Wyo., Mar. 23, 1988) (prior decisions appealed but not ruled upon are final, "presumptively valid," and may be relied upon); Eldon L. Smith, 5 IBLA 330, 339-44, 79 I.D. 149, 153-54 (1972); cf. United States v. Mineco (On Reconsideration), 130 IBLA 314, 318 (1994) (claimant required to pay rental fees during pendency of appeal of decision issued prior to revision of 43 C.F.R. § 4.21).

Accordingly, we hold that, after BLM's April 13, 1993, Decision became effective, neither Sigma nor D. Phifer, the reported purchaser, was required to perform assessment work on the April No. 1R, no rental fees were due for the claim, and a small miner exemption was not available

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5/ "There is no procedure in the public land statutes for staying the effectiveness of the Department's decision, and the Administrative Procedure Act, 5 U.S.C. § 705 (1976) must be utilized in order to accomplish this." Winkler v. Andrus, 614 F.2d 707, 709 (10th Cir. 1980).

6/ It appears that the drafters of the Administrative Procedure Act did not anticipate that an agency would establish a rule making a decision effective pending appeal within the agency.

"In no case may appeal to `superior agency authority' be required by rule unless the administrative decision meanwhile is inoperative, because otherwise the effect of such a requirement would be to subject the party to the agency action and to repetitious administrative process without recourse. There is a fundamental inconsistency in requiring a person to continue `exhausting' administrative processes after administrative action has become, and while it remains, effective." Darby v. Cisneros, supra, at 2545 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 27 (1945)); see also U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 104-05 (1947), reprinted, Administrative Conference of the United States, Federal Administrative Procedure Sourcebook 170-71 (2d ed. 1992).

as an alternative to paying rental fees. BLM's Decision finding the April No. 1R lode claim to be abandoned and void is reversed.

Sigma's arguments concerning the main issue on appeal are based upon two misunderstandings. First, it incorrectly describes BLM's Decision as stating that Sigma "did not sell the claims" and as an attempt to void the sales. Nothing in the Decision addresses whether the sale documents filed by Sigma were sufficient to convey interests in the claims or purports to approve or disapprove the transfers. Although BLM does have authority to determine mining claim ownership when circumstances require, David J. Bartoli, 123 IBLA 27, 41, 99 I.D. 55, 62 (1992), it neither approves nor disapproves a transfer of interest in a mining claim, but simply places the document a claimant submits into the case file for the claim so that the Department's records will accurately reflect the claim's ownership. See 43 C.F.R. § 3833.3(c). In this case, BLM reviewed the sales documents which had been filed in order to determine whether Sigma qualified for a small miner exemption. It concluded that, due to the clause prohibiting subsequent sales without Sigma's approval, Sigma had not conveyed its "full interest" to the purchasers. Because BLM viewed Sigma as continuing to hold an ownership interest in the claims sold, as well as full ownership of the remaining claims, it properly concluded that Sigma held more than 10 claims, did not qualify for a small miner exemption, and rental fees were required.

Second, Sigma erroneously believes that the mining claims gave it title to the minerals within the claims. While the full array of rights a mining claimant acquires is somewhat complex, in order to respond to Sigma's error it is sufficient to note that a mining claim does not give the claimant legal or equitable title, but "the exclusive right of possession and enjoyment of all the surface * * * and of all veins, lodes, and ledges throughout their entire depth." 30 U.S.C. § 26 (1994); see generally 2 American Law of Mining ch. 36 (2d ed. 1995). Until the United States surrenders the last vestiges of title by issuing patent to the ground, "it does have the power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and if it be found invalid, to declare it null and void." Best v. Humboldt Placer Mining Co., 371 U.S. 334, 337-38 (1963), quoting Cameron v. United States, 252 U.S. 450, 460 (1920). Sigma is correct that it was free to sell its interests in the claims without approval by BLM, but BLM was free to determine whether Sigma had retained an interest in the claims for the purpose of determining whether Sigma qualified for a small miner exemption.

[3] When BLM determines that, due to a provision in sales documents for mining claims, the transferor retained an ownership interest in the claims, those claims will be attributed to the transferor for purposes of the small miner exemption. The BLM Decision properly applied the rationale within 43 C.F.R. § 3833.1-6(a)(3) in determining that retention of veto power over the sale or encumbrance of the claims is the retention of an ownership interest. That regulation provides: "Mining claims held in co-ownership, or by association of locators, or by a partnership, or by a corporation shall be counted toward the 10-claim limit for claimants that have an interest in these entities." Id.

[4] Finally, Sigma requests that it be awarded $4,000 in fees for the time spent preparing its appeal. (SOR at 6.) Fees and expenses may be awarded to the prevailing party in an adversary adjudication under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1994). Although Sigma has requested fees, it has not filed a formal and complete application and its request is premature. See 43 C.F.R. §§ 4.608 through 4.611. No purpose would be served, however, in suggesting that Sigma make a proper application because fees cannot be awarded in this proceeding. As defined by Departmental regulations, an adversary adjudication is an adjudication under section 5 U.S.C. § 554 (1994). 43 C.F.R. §§ 4.602(b), 4.603(a). With exceptions, that statute applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 504(a) (1994). There was no hearing in this case, nor did a statute require that BLM's Decision be made "on the record after opportunity for an agency hearing." Since there was not an adversary adjudication, the EAJA does not apply and no award can be made. Herbert J. Hansen, 119 IBLA 29, 31 (1991); Benton C. Cavin, 93 IBLA 211, 215-16 (1986); see Cavin v. United States, 19 Cl. Ct. 198 (1989).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the October 27, 1993, Decision by the California State Office is affirmed in part, as modified, and reversed as to the April No. 1R lode claim.

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James P. Terry
Administrative Judge

I concur:

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Franklin D. Arness
Administrative Judge